ATTACHMENT B

MEMO TO: 2021 CHILD SUPPORT COMMISSION
FROM: THOMAS M. KELLER
RE: SUGGESTED CHANGES TO CHILD SUPPORT LAWS

Thank you for the opportunity to address the commission at the Sioux Falls location on September 30th. I am putting my notes to paper in the respective categories.

1. SDCL 25-7-6.19 Credit for arrears during time NCP had the minor child. As pointed out, this only allows for a credit against "arrears" that accumulated during the time a non-custodial parent (NCP) had the minor child 4 months or more in a row. The concern is that someone who doesn't pay child support (even though it is owed) is allowed to have those arrears wiped out, while someone who actually pays his or her child support does not have the right to have those payments credited. The intent is to have zero child support during that time, so long as it is 4 months or more in a row. Solution: remove the word "arrearages" from the phrase "the court may credit the obligor for child support arrearages which accumulated during the period….."

2. SDCL 25-7-6.19 Credit for Social Security or disability payments. Similar to the above – if the obligor parent is disabled or retired, he or she receives a credit (up to the monthly child support amount) in any month when the CP receives funds for the minor child due to the obligor's disability or retirement. The problem is the "in the month" language – oftentimes, someone who is applying for disability waits awhile before applying, but cannot pay child support. Ideally, this statute should allow a credit beyond the monthly amount, and to reimburse the NCP if he or she paid child support during a month in which a disability payment is also received (as oftentimes, once disability is awarded, several months of back-due payments are included. If the NCP paid support during that time, he or she is not reimbursed for those funds, but if the NCP did not pay during that time, he or she may be credited for those past-due payments). Solution: Add a sentence that says something like – "The obligor shall receive a credit for any actual payments made during the period of disability from sources other than the disability or Social Security, but only to the extent to which they exceed the monthly amount owed in any such month, which credit may be applied to arrears or reimbursed to the obligor."

3. Cross-credit. There are a few things that should be considered in this. First, it says "if a custody order by a Court…." and I think the referees ought to be able to do this if the parties agree. So maybe "If the parties agree in a child support referee

hearing or if a custody order by the court……." We also spoke about capping the amount of the combined income that would be multiplied by 1.5 because of the absurd results that occur where (if one parent is very high income and the other is low) the actual amount paid under cross-credit exceeds the amount owed under a direct payment using traditional guidelines.

4. Ancillary and related to the above is the "hybrid" situation – where one child is in joint physical custody/cross-credit and the 2nd or 3rd child is not. If Parent A pays under the cross-credit, and then we do an "entirely new" child support calculation for child 2, parent A often pays MORE than he or she would if Parent B had both children all the time. Well, that's obviously not right that having shared parenting of one child raises your child support. The key is that they cannot be two "separate" calculations. My proposed solution is that you do the dominant calculation first (if there are 4 kids and Parent B has 3 of them, you do a "3-child" calculation for the first 3 kids, and then do a cross-credit calculation, but only for the difference in the guidelines between a 3-child and a 4-child calculation. On the other hand, if one child is in joint and one is primarily with one parent, I think you do the cross-credit first, and then a straight pro-rated addition (example: combined income of $4,000, one child child support is $897, two child child support is $1,295. So you would do a cross-credit of the $897 (multiply by 1.5, etc.). Once you completed that part, you would do a direct pro-rata share of the remaining $398 (the difference between one-child and two-child totals). So, whatever the cross-credit calculation was, you would add the NCP's pro-rata share of $398 to that amount to achieve the final figure.

5. Abatement statute is 25-7-6.14. My thoughts – abatement could start way lower than 10 overnights (as people suggested, it really comes down to whether or not the NCP needs to have a place large enough and with enough beds and bedrooms to have the kids overnight – this extra expense is not considered in the child support formula anywhere, but really does distinguish active parents from those that never see their children, and as people suggested, there is a world of difference between having your kids 9 overnights a month and 0). This is probably something that an economic expert would be needed to figure out.

   In addition, the referees are not on the same page on this statute. The literal language says that a court order must already set forth the overnights and the percentage of abatement before a referee can consider anything. I don't like that – parents don't like that either. I think the solution is to add this to the list of "deviations" rather than a separate statute – it can be category (7) of SDCL 25-7-6.10 listing the abatements to ensure that referees must canvass this subject in every hearing. Many referees try to use this if parents have agreed to share time with the kids (the thinking being that, once the child support order is signed by a judge, there will be an "order" setting forth the number of overnights and degree of deviation/abatement, and if someone doesn't like it, they can appeal the referee's ruling). So the new language should dictate that the child support referee shall canvass this subject and make recommendations for a deviation if the NCP

qualifies. There can also be some teeth to the 38-66% language – a sentence that indicates "the degree to which the NCP pays for additional activities and time with the children, including lodging, activities, sports and recreation, over and above the basic obligation, should determine the degree of abatement."

6. SDCL 25-7-6.15 – travel costs are, right now, a separate consideration. Those should be included in the deviations under 25-7-6.10, rather than mandating a separate consideration by a judge. (In my own hearings, I go through all the deviation categories, as well as "time spent with the non-custodial parent" and "transportation costs" thus creating 8 categories for deviation rather than the statutory 6).

7. Further on the deviations, the South Dakota case of Muenster v Muenster established the rule that income may not be "imputed" to either parent in deciding whether a parent is unemployed or underemployed. One can only use an actual prior position, and a voluntary reduction from that prior position, to determine whether a parent has voluntarily reduced his or her income. This should be amended to allow a referee/judge to decide if a parent is earning less than he or she could be. The phrase that is used in spousal support is "income-earning capacity of the parties" rather than anything else. It would be nice to be ABLE to consider earning capacity rather than actual earnings. So maybe the deviation under 6.10(6) should read "The voluntary and unreasonable act of a parent which causes the parent to be unemployed, underemployed, or earning less than his or her capacity, unless the reduction of income is due to incarceration." The existing language (even though there is a specific case that says going back to school does – within the context of providing for one's children – constitute a voluntary and unreasonable reduction of income), that sure seems contrary to the actual language of the statute. Since when it is "unreasonable" to start one's own business, or get married and stay home with subsequent children, or go back to school to earn an advanced degree? It isn't unreasonable in terms of life choices, but it should be clear that we're talking about "unreasonable" solely in the context of the requirement to support one's children. As my example reflected, it might be completely reasonable to go back to school to go from an RN degree to a Physician's Assistant or CNP if one's children are 6 and 8, but "deciding to go back to school" for a two-year degree when your kids are 17 and 16 is not so reasonable in light of the obligation of support.

8. Should student loan payments be an automatic deduction from wages? We encourage people to save for retirement by deducting their 401(k)/IRA contributions (to a maximum of 10%) but give nothing for student loan obligations, even though we do consider the newer, higher income earned. That seems unfair somehow. Young people have student loans, older people contribute to retirement. Perhaps a student loan obligation, up to a maximum of 10%, and proof that the payments are actually being made, could be an additional deduction from gross wages under SDCL 25-7-6.7. Student loans are not dischargeable in

bankruptcy, but are generally not considered in the "overall financial condition" deviation by most referees.

9. I tell the commission every four years that there should not, ever, be a "free pass" when the new set of rules occurs. This causes all kinds of headaches – let's assume that the commission changes are passed by the 2022 legislature to take effect 7/1/22 – someone going through a divorce in the spring of 2022 can agree, for instance, to accept $200 a month child support in return for not contesting custody. Then three months later, the CP petitions to raise the child support back up. I'm NOT advocating for cheating the system, but it happens. And it happens the other way, too. NCP says, "I will pay you $1,100 a month in support for our one child if you agree to joint physical custody (or drop alimony, or whatever)." Then, if there is no alimony at the time of the divorce, there can never be any, ever, but the NCP comes back four months later and reduces the child support to $150. This can happen in the context of property settlements as well – let me keep the car, and I'll keep your child support low. Give me the car and I'll pay you an extra $300 in child support. The general rule should ALWAYS apply – a substantial change in circumstances is necessary to modify child support within the 3-year window, so at least folks can rely on receiving it for that period of time. Even if the guidelines change to reflect increased costs (or decreased costs) of child-raising, I doubt it would meet my own "substantial change" language for the vast majority of people. Perhaps the commission report can state that "only if application of these guidelines creates a substantial change in circumstances for either parent may he or she petition for modification based solely on the implementation of these guidelines."

10. Taxes. Previous iterations of the guidelines allowed the referees to consider which parent claimed the minor child/children for tax purposes. It appears that this is going to be a larger and larger consideration for future tax returns – a parent who earns almost nothing receives a $7,000 tax refund/stimulus. This is true even if the NCP is paying 70% of the cost of raising the children. The reason that they eliminated this was because the referees were applying it differently throughout the state, but a well-drafted statute (again, in the deviations) could fortify this. Not sure of the specifics (would need an economist to determine). But we use a standard 25% reduction in the daycare costs to reflect the tax advantage to the parent who has daycare expenses, we should be able to apply a percentage to tax refunds as well. For example (and this is using the exact language from the former statute): SDCL 25-7-6.10(9) (7 and 8 being overnights and travel costs): "Whether the federal income tax dependent deduction for such minor child is allocated to the benefit of the support obligor or the custodial parent." And add to that that the referee/court should, absent a showing that it would cause a substantial hardship, "apportion any direct child tax credits or stimulus payments, but not the dependency exemption, on a pro-rata basis, giving the obligor credit on his or her monthly support obligation for $1/12^{th}$ of his or her pro-rata share of the above." It could/should also state that this deviation "only applies if the parties

have not made any other arrangements for apportioning of the child tax credit or stimulus payments, and the custodial parent claims all children for tax purposes."

Thank you all for your time and service. Thanks for giving me the time to address this.

Tom Keller
400 N. Main Ave., Suite 201
Sioux Falls SD 57104
(605) 338-3220
tom@thomaskellerlaw.com